BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

LAUREN M. & VICKY L. BUCK, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 06-018 ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the Pollution Control Hearings Board (Board) on a Motion for Summary Judgment filed by the Respondent Department of Ecology (Ecology). Appellants are challenging the Order of Cancellation Docket No. DE 87-C464 issued by Ecology on December 23, 1987, which cancelled Water Permit G4-28499P. In its motion, Ecology contends it is entitled to summary judgment and dismissal because the appeal was filed with the Board after the appeal period had expired, and therefore the Board does not have jurisdiction to hear the Buck's appeal.

Board Members William H. Lynch, Chair, Kathleen D. Mix, and Andrea McNamara Doyle, Presiding, deliberated on the motion. Assistant Attorney General Sarah Bendersky represented Ecology. Lauren Buck, acting *pro se*, represented the Appellants.

In reaching its decision on the motion, the Board reviewed and considered the following submittals by the parties:

1. Notice of Appeal with attachments;
2. Motion by Ecology for Summary Judgment; Memorandum in Support of Respondent's Motion for Summary Judgment; Declaration of Darrell J. Monroe in Support of Respondent's Motion for Summary Judgment, with attached Exhibits 1-8;
3. Reply in Support of Respondent's Motion for Summary Judgment; Declaration of Sarah Bendersky in Support of Reply, with attached Exhibit 1;
4. Letter dated July 3, 2006, filed by Lauren Buck, responding to Motion for Summary Judgment;
5. Ecology's Supplemental Reply to Appellant's Response; Second Declaration of Sarah Bendersky, with attached Exhibits 1-2;
6. Letter dated July 20, 2006, filed by Lauren Buck, replying to Ecology's Supplemental Reply, with 2 attachments.
7. Correspondence in the official file for PCHB No. 06-018.

The parties submitted this matter to the Board for its consideration on the written record without oral argument. Accordingly, having reviewed the above-listed documents and being fully advised, the Board enters the following ruling.

Background

Permit No. G4-28499P (permit) was issued by Ecology on January 10, 1985, to Hilltop Water Company (Hilltop) for the purpose of supplying domestic water to a 22-home project site being developed approximately 6 miles east of Kennewick at Goose Gap.

The Appellants purchased Lot 1 within this development and, in April 1986, signed an agreement with Hilltop related to the supply of water and utilities for the lot.

At Hilltop's request, Ecology extended the development schedule contained in the permit from October 1, 1986, to October 1, 1987. An October 1986 Construction Notice approving the

extension contains the remark that: "One lot of this development has been sold but the purchasers do not plan to build at this time." *Declaration of Darrell J. Monroe, Exhibits 6 & 7.*

The following year, also at Hilltop's request, Ecology cancelled the permit on December 23, 1987. The Order of Cancellation Docket No. DE 87-6464 (Order of Cancellation) stated: "On December 10, 1987, the permittee requested cancellation of the permit." It further stated: "Any person feeling aggrieved by this order may obtain review thereof by application, within thirty (30) days of receipt of this order, to the Washington Pollution Control Hearings Board…" *Monroe Declaration, Exhibit 8.*

A certified mail receipt indicates that the Order of Cancellation was delivered to Hilltop on December 24, 1987. Hilltop did not appeal the Order. *Monroe Declaration, p. 2.*

The Appellants contend, and Ecology does not challenge, that the Bucks did not receive notice of the Order of Cancellation from Ecology at the time it was issued. Appellants further contend that March 10, 2006, was the date they first received a copy of the Order of Cancellation. *Appellant's Notice of Appeal, March 17, 2006.* Ecology does not dispute this date.

The Bucks filed their initial Notice of Appeal with this Board on March 22, 2006, and their Amended Notice of Appeal on March 29, 2006.

Based on these facts, Appellants' argument opposing summary judgment is two-fold: first, that Ecology should have provided them notice at the time it issued the Order of Cancellation; and second, that they appealed the order within thirty (30) days of when they actually received a copy of it on March 10, 2006. Ecology counters that it had no legal obligation to send the Order of Cancellation to the Bucks (only to the permittee). Ecology

additionally argues that, by rule, the thirty (30)-day appeal timeline provided in the order cannot extend more than forty-five (45) days from the date it was mailed to Hilltop, regardless of when Appellants may have actually received a copy.

Analysis

Summary judgment is a procedure designed to eliminate trials if only questions of law remain for resolution, and is appropriate when the only controversy involves the meaning of statutes or regulations, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d 1004 (1991). If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating material facts are in dispute. *Avalon Links v. Ecology*, PCHB No. 02-036 (2002). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 307 (1992).

In this case, it is not disputed that the Appellants were beneficiaries of the water permit at issue in this case, but it is also not disputed that the permit was held by Hilltop, not the Bucks. Generally speaking, legal rights associated with a water permit attach to the permit holder, not to the land or to the owner of the land where the water will be used. See e.g., *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933), *Haase v. Ecology*, PCHB No. 765 (1975). These rights include the right to receive notice of a cancellation order, where the law requires Ecology to send the order only to the permittee. *RCW 43.27A.190*. It is not until a water right is perfected, through the issuance of a water right certificate, that rights attach to the property (and therefore

the property owner). *RCW 90.03.330.* Permits and permit applications are considered personal property and must be assigned separately to be transferred. *Stout v. Ecology*, PCHB No. 89-99 (1990). This is why many purchasers of land and/or water require a state-recognized "assignment" of the permit or permit application as part of the purchase: to avoid future ownership disputes, to receive notice of orders potentially affecting the permit (such as notices of violations, or of new water right applications from neighbors), and to receive notification of changes in the law or future adjudications that could affect the right.

Under the circumstances in this case, where Hilltop held the permit and there was no valid assignment to the Bucks, we conclude Ecology was not legally obligated to provide notice of the Order of Cancellation to Appellants at the time it sent the order to the permittee.

Appellants attempted to protect their water supply through a private contract with the permittee. They argue that through this contract they were "legally tied" to the original permit. *Letter dated July 20, 2006, filed by Bucks in response to Motion for Summary Judgment.* Although such a contract may establish the rights and obligations between the two parties who sign it, it does not affect Ecology's obligations related to the permit, which can only be done through the procedures provided in state law. The assignment law provides that "no such assignment shall be valid or binding unless filed for record with the department [of Ecology]." *RCW 90.03.310*.

Appellants also argue that Ecology was aware that someone had bought property associated with the well and/or that Ecology should have conducted a search of the public records. *Letters dated July 3, 2006, and July 20, 2006, filed by Bucks in response to Motion for*

Summary Judgment. But Appellants cited no legal authority, and the Board could not find any, that would have required Ecology to notify them under these circumstances in the absence of a validly recorded assignment of the permit.[1]

This Board has previously held that when Ecology learns that real property has been transferred, it does not automatically acquire notice that any water rights application has been transferred. *Stout v. Ecology*, PCHB No. 89-99 (1990). It has also held that Ecology is not obligated to provide notice of its water rights decisions to property owners within a development served by the developer's water right. *Lake Entiat Lodge Associated v. DOE*, PCHB No. 00-127. In *Lake Entiat Lodge*, a homeowners' association filing an appeal in 2000 contended that its members, lot owners in a development served by a developer's water right, were not provided notice of an Order of Cancellation issued twenty-two (22) years earlier. Ecology had issued the decisions to the holders of record as it was required to do under RCW 90.03.320 and RCW 90.03.330. The Board found that Ecology was not required to conduct a title search before it issued a water rights decision, and further concluded that the homeowners were not otherwise entitled to notice of the decision at the same time as the developer. *Id.*[2] We decline to find that

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[1] To the extent that Appellants may be suggesting that this Board should somehow "enforce" their private water supply agreement against either Hilltop or Ecology, the Board cannot do so. The Board's authority is established, and limited by, the jurisdiction granted to it by the Legislature. *City of Seattle v. Dep't of Ecology*, 37 Wn. App. 819, 823, 683 P.2d 244 (1984). Neither the Legislature's statutory grant of authority, nor the Board's regulations pertaining to jurisdiction, give it any authority to hear private contract disputes or to apply their provisions to Ecology. RCW 43.21B.110(1), WAC 371-08-315(2).

[2] In concluding that notice was not required for the homeowners, the Board cited *Den Beste v. Pollution Control Hearings Board*, 81 Wn. App. 330 (1986). The court in *Den Beste* had found that the Yakama Indian Nation had expressed its concern about several individual applications for groundwater withdrawals around Yakima by attending public and private meetings and by submitting written input to Ecology. The court concluded that this

the remark in the October 1986 Construction Notice somehow changed the Bucks' rights under the permit or Ecology's obligations regarding the same.

The Appellants' second argument in opposition to summary judgment is that the thirty (30)-day appeal deadline should be counted from the date they received a copy of the order in March, 2006, even though that date is more than nineteen (19) years after the order was issued. As support for their argument, Appellants point to the language in the order, which states that "Any person feeling aggrieved by this order may obtain review thereof by application, within thirty (30) days of receipt of this order…" *Order of Cancellation (Emphasis added).*

This same argument, however, has been previously addressed by this Board and the courts. In *Center for Environmental Law & Policy (CELP) v. Department of Ecology,* the Board resolved the question of whether similar language in state law starts a new, unique thirty (30)-day appeal period for a third party that receives a copy of an Ecology decision after it has been sent to the applicant. The Board, relying on the court's *Den Beste* decision, found that CELP was not entitled to notice at the same time Ecology mailed its water rights decision to the applicant and concluded that the fact that CELP was mailed a copy of the decision nearly one month after the applicant "does not confer a new thirty-day period for the appeal to be filed with the board." *CELP v. Ecology*, PCHB No. 00-090 (Order of Dismissal), p. 3.

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level of direct and active involvement was sufficient to entitle the tribe to timely notice of the department's decisions in order to allow it the opportunity to appeal them to the Board.

Respondents in this case also point to the Board's regulations to argue that there are limits on how long the "date of receipt" can extend beyond the date Ecology mails a decision to a party entitled to notice. The Board's rule states:

> (1) An appeal before the board shall be begun by filing a notice of appeal with the board at the environmental hearings office and by serving a copy of the appeal notice on the agency whose decision is being appealed. For the board to acquire jurisdiction both such filing and such service must be timely accomplished.
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> (2) The notice of appeal shall be filed with the board within thirty days of the date of receipt of the order or decision. The board's rule governing the computation of time (WAC 371-08-310) shall determine how the thirty-day appeal period is calculated. The 'date of receipt' of an order or decision means:
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> (a) Five business days after the date of mailing; or
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> (b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing. WAC 371-08-335(2) (Emphasis added).

Ecology argues that, based on this rule, the Bucks' appeal must have been filed and served no later than forty-five (45) days from December 23, 1987 (the date the order was mailed to Hilltop) in order for the Board to have jurisdiction over the appeal. *Supplemental Reply to Appellants' Response, p. 3.* We agree based on the fact that Hilltop was the only party entitled to notice of the decision. To conclude otherwise would be no different than allowing a new appeal period whenever any third party is mailed a copy of an order at any point in the future for any reason. This result would run counter to the important public interest served by achieving finality in water rights decisions (including cancellation decisions) which allow for the orderly distribution and regulation of the waters of the state.

In conclusion, the Appellants filed their appeal more than nineteen (19) years after the Order of Cancellation was issued. Because Appellants have not demonstrated that they were legally entitled to notice, there is no basis for the Board to excuse such delay or to allow a new thirty (30)-day appeal period based on when they eventually received a copy of the order. The requirement of filing a timely notice of appeal was not met in this case. Therefore, the Board lacks jurisdiction to consider this appeal, and the matter should be dismissed.

ORDER

IT IS HEREBY ORDERED that Respondent's motion for summary judgment is GRANTED and the above-captioned appeal is DISMISSED.

DONE this 3rd day of August 2006.

POLLUTION CONTROL HEARINGS BOARD

ANDREA MCNAMARA DOYLE, PRESIDING

WILLIAM H. LYNCH, CHAIR

KATHLEEN D. MIX, MEMBER